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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 560

RALPH H. TRAHER and VIRGINIA M. TRAHER,
Petitioners

v.

DE HAVILLAND AIRCRAFT OF CANADA, LTD.,
Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The Memorandum Opinion of the District Court is not reported but appears as Appendix A to the petition for certiorari (pp. 1a-2a). The opinion of the United States Court of Appeals for the District of Columbia Circuit is reported at 294 F.2d 229 and appears as Appendix B to the petition for certiorari (pp. 3a-4a).

JURISDICTION

The judgment of the Court of Appeals for the District of Columbia Circuit was entered on June 29, 1961 (Pet. App. 5a). Petitioners' petition for rehearing *en banc*, timely filed, was unanimously denied by order dated August 23, 1961 (Pet. App. 6a). The petition for certiorari was filed on November 20, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTION PRESENTED

Whether the Court of Appeals was correct in holding that respondent's minimal contacts with the local life of the District of Columbia disclosed by this record were insufficient to constitute doing business according to District of Columbia law so as to render respondent immune from service of process pursuant to D.C. Code § 13-103 (1951).

STATEMENT

This action for damages for personal injuries allegedly received in a plane crash in the State of Montana and for loss of consortium was instituted in the United States District Court for the District of Columbia on June 2, 1960 (J.A. 1).[1] Petitioners, plaintiffs below, are residents of Minnesota, the defendant is a corporation organized and existing under the laws of Canada, and the plane crash occurred near Malta, Montana on June 5, 1957 (J.A. 1-2). The pertinent allegations of the complaint are that on June 5, 1957 the male petitioner, an employee of the Immigration

[1] J.A. references are to the Joint Appendix prepared for the Court of Appeals and filed as the record in this Court pursuant to Rule 21 (4).

and Naturalization Service, was a passenger in an airplane owned by the United States which crashed on landing near Malta, Montana (J.A. 1-2). It is alleged that the plane was manufactured by the respondent and sold by it to the United States (J.A. 1-2), and that the respondent's negligence in the design, assembly, and manufacture of the plane caused the crash (J.A. 2). The doctrine of res ipsa loquitur is also invoked (J.A. 3). As an additional ground of liability, the complaint alleges the breach of an implied warranty running to the United States (J.A. 3).[2] Since the male petitioner was in the course of his employment with the United States Government at the time of the accident, he has received compensation benefits from the United States pursuant to the provisions of the Federal Employees Compensation Act (5 U.S.C. § 751 et seq.) (J.A. 18).

Thereafter, respondent moved to quash the return of service on the ground that it was not "doing business" in the District of Columbia so as to render it amenable to service of process there (J.A. 4). In support of the motion two affidavits were filed—one by Joseph E. McDonald, Jr., McLean, Virginia, respondent's sole employee in the District of Columbia, and the other by George Joseph Mickleborough, Ontario, Canada, the secretary-treasurer and a director of the respondent (J.A. 5, 6). These affidavits disclose that respondent has but one employee in the District of Columbia, viz. Joseph E. McDonald, Jr., (J.A. 5, 8). He is provided with part-time secretarial service, a desk, a

[2] Respondent did not challenge the legal sufficiency of these allegations but relied instead on the ground that it was not doing business in the jurisdictional sense according to the local law of the District of Columbia.

chair, and telephone answering service in the District of Columbia through an arrangement with Aero Insurance Agency, which began in 1957, after the accident which gives rise to this litigation had occurred (J.A. 5, 8). Respondent maintains all company books and records in Ontario, Canada, where all directors' and stockholders' meetings are held (J.A. 6). No company books or share registers are maintained in the District of Columbia, nor have any stockholders' meetings ever been held here (J.A. 7). Respondent is not now, nor has it ever been, licensed to do business in the District of Columbia (J.A. 7). Moreover, it has never paid any taxes in the District (J.A. 7).

The function of the sole employee in the District of Columbia is to maintain liaison with branches of the Government to obtain information concerning their possible requirements of respondent's products and to forward such information to respondent's main office (J.A. 5, 8). This person does not have the authority to make commitments for respondent, nor does he have the power of decision with respect to the sale of respondent's products. All such inquiries are directed to respondent's main office (J.A. 6, 8). No contracts for the sale of respondent's products are executed in the District of Columbia nor does it maintain any stock or warehouse here (J.A. 6, 8). All sales of respondent's products to the Department of Defense are made to the Canadian Commercial Corporation, an agency of the Canadian Government, which in turn contracts with the Department of Defense (J.A. 9). Delivery under such contracts is made at Downsview, Ontario (J.A. 9). Contracts for the sale of respondent's products to the civilian agencies of the Government are made either by respondent with a

broker in the United States who may then resell to the agency involved or directly by respondent with the Government (J.A. 9).[3] No airplane or spare parts have ever been delivered to any purchaser in the District of Columbia (J.A. 9). Although respondent's name appears in the Washington telephone directory, it does not appear in any trade directory (J.A. 9). Of course, should an inquiry be received from a non-governmental source, the liaison man is expected to reply courteously and refer the caller to respondent's sales and service office (if the call relates to a sale or service) (J.A. 5, 8). That office is not located within the District of Columbia (J.A. 5, 8).

On the basis of the foregoing facts respondent moved in the District Court to quash the return of service upon it on the ground that it was not "doing business" in the District of Columbia within the meaning of D.C. Code § 13-103 (1951), as that statute had been construed by the United States Court of Appeals for the District of Columbia Circuit (J.A. 4). The District Court granted the motion to dismiss on the ground that respondent's activities "are confined to solicitation of business and to answering inquiries as well as gathering information" and that the activities described were "not sufficient activities to constitute the doing of business in the District of Columbia . . ." (J.A. 27).

The Court of Appeals affirmed *per curiam*, without dissent (Pet. App. 3a). After reviewing the facts with respect to the contacts of respondent with the local

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[3] There is nothing in the record to indicate how this particular plane was transferred from respondent to the United States Government.

business life of the District of Columbia the Court remarked of this Montana plane crash that "the present suit has no connection with the District of Columbia or appellee's [respondent's] activities here, such as they are" (Pet. App. 4a). Relying also on its decision in *Mueller Brass Co.* v. *Alexander Milburn Co.*, 80 U.S. App. D.C. 274, 152 F. 2d 142 (1945), the Court noted that in *Mueller*

> the governmental contacts of the defendant were insufficient to provide a basis for service in a suit brought by a plaintiff not involved in those contacts. The same is true in the instant case, which is strikingly similar in its facts. (Pet. App. 4a).

The judgment of the Court of Appeals was entered on June 29, 1961 (Pet. App. 5a). Thereafter, a petition for rehearing, *en banc*, was filed by petitioner. On August 23, 1961 with all nine judges of the Court of Appeals participating, the petition for rehearing was denied, *per curiam*, again with no dissent (Pet. App. 6a).

ARGUMENT

1. The Court of Appeals has correctly interpreted a statute of local applicability. This Court, of course, "will not ordinarily review decisions of the United States Court of Appeals, which are based upon statutes so limited [confined in operation to the District] or which declare the common law of the District." *Del Vecchio* v. *Bowers*, 296 U.S. 280, 285 (1935). See also *Griffin* v. *United States*, 336 U.S. 704, 712-718 (1949); *District of Columbia* v. *Pace*, 320 U.S. 698, 702 (1944). Since this case arises under an interpretation of the District of Columbia Code there is no "federal standard" applicable to it. But even if there were, it does

not follow that such a standard must be applied to the District of Columbia. As this Court said in *Griffin* v. *United States, supra,* 336 U.S. at 712:

> But even assuming that the "federal rule" is that the evidence described in the motion for a new trial would be admissible, it does not follow that it must also be the rule for the District of Columbia. This Court, in its decisions, and Congress, in its enactment of statutes, have often recognized the appropriateness of one rule for the District and another for other jurisdictions so far as they are subject to federal law.

The Court of Appeals has acted correctly in a case peculiarly within its own jurisdiction, and its interpretation of a local statute should not be reviewed by this Court.

2. Petitioners state that this case presents a "fundamental constitutional issue" (Pet. 8) and an "important constitutional question" (Pet. 11) since, as they view it, the "guarantees of the Fifth and Fourteenth Amendments protect [their] cause of action" (Pet. 12). Since the provisions of the Fourteenth Amendment apply only to a "State" as distinguished from the District of Columbia, we pass without comment this phase of petitioners' argument. With respect to petitioners' suggestion that due process requires the District of Columbia courts to hear their case, they are met at the outset with the fact that the point is not seasonably raised. Petitioners' suggestion that due process required the lower court to deny the motion to quash was made for the first time in their Petition for Certiorari addressed to this Court. It thus comes too late.

3. Petitioners argue that due process *compels* the District of Columbia to open its courts to petitioners'

cause of action because of respondent's contacts within the District. In so arguing, petitioners rely upon three of this Court's opinions, two of which dealt only with the question whether due process *prohibited* a state from opening its courts to a cause of action because the party served had so few contacts with that state,[4] and the third of which supports respondent's position rather than petitioners'.

Thus, in *International Shoe Co.* v. *Washington*, 326 U.S. 310 (1945), International Shoe claimed that its activities within the State of Washington were not sufficient to "manifest its presence" there, and thus it was denied due process by being subjected to suit in that state. This Court *held* that International Shoe's activities were so "systematic and continuous throughout the years" in the State of Washington that it was not denied due process by being subjected to suit there. *Id.* at 320. There was no indication whatever in the opinion that the State of Washington was compelled by the Due Process Clause to entertain the suit.[5]

Similarly, in *McGee* v. *International Life Ins. Co.*, 355 U.S. 220 (1957), the California court, applying a California statute that subjected foreign corporations to suit in California on insurance contracts with residents of that state, entered judgment against Inter-

[4] The significance of the difference between prohibiting and compelling the entertainment of a cause of action was recognized by this Court in *Perkins* v. *Benguet Consolidated Mining Co.*, 342 U.S. 437, 446-448 (1952).

[5] Even if there had been such an indication, the decision would not be applicable here. International Shoe employed systematic and widespread solicitation by eleven to thirteen salesmen in the State of Washington. Such contacts were, of course, missing here.

national Life. A Texas court refused to enforce the judgment. This Court *held* that since the insurance contract had a substantial connection with California, due process "did not preclude the California court from entering a judgment binding on" International Life (*id.* at 223), and consequently Texas was required to give full faith and credit to the California judgment. Again, there was no ruling, implied or otherwise, that California was required to entertain the suit.[6]

The third case from this Court relied upon by petitioners is *Hanson* v. *Denckla*, 357 U.S. 235 (1958). Far from militating against the decision in this case, the decision there actually supports it. This Court *held* that the contacts which the Wilmington Trust Company had with the State of Florida were insufficient to render it subject to service of process emanating from the Florida courts. This Court noted in part that "the cause of action in this case is not one that arises out of an act done or transaction consummated in the forum State" (*id.* at 251) a comment equally applicable to the facts in the present case.

Thus, the asserted violation by the Court of Appeals of principles announced by this Court is non-existent. The decision in this case rests on the doctrine of *Mueller Brass*, decided in 1945 after this Court's decision in *International Shoe*, and applies a construction of the D.C. Code which has been settled for more than fifteen years.

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[6] Again, even if there had been such a ruling, it would not be applicable here. The insurance contract in the *McGee* case was delivered in California, the premiums were mailed from California, and the insured was a resident of California when he died. 355 U.S. at 223.

4. Finally, petitioners assert that the decision of the Court of Appeals is in "substantial conflict" with decisions of other Courts of Appeal (Pet. 8). The alleged conflict is illusory.

The Court of Appeals in this case decided no more than that the contacts which respondent has with the local life of the District of Columbia are so minimal that respondent could not be said to be "doing business" in the District as that term is used in the D.C. Code. The Court was interpreting a local statute, and its decision was supported by its prior ruling in *Mueller Brass* construing the same statute. *Mueller Brass* has become a well accepted part of the local law of the District of Columbia in the more than fifteen years since it was decided.[7]

The decisions of the circuit courts which petitioners claim are in conflict with the instant case were all rendered in diversity of citizenship cases, and two of them were interpreting the local law of other jurisdictions. Thus, in *Florio* v. *Powder Power Tool Corp.*, 248 F. 2d 367 (3d Cir. 1957), the court tested corporate presence by reference to a local Pennsylvania statute, and the opinion was entirely directed to the proper application of Pennsylvania law under Pennsylvania standards. Similarly, in *Westcott-Alexander, Inc.* v. *Dailey*, 264 F. 2d 853 (4th Cir. 1959), the court was concerned only with a Virginia statute and Virginia decisions to measure the acts of the defendant and decide whether or not the corporation was present for jurisdictional purposes.

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[7] See, *e.g.*, *Weisblatt* v. *United Aircraft Corp.*, 134 A. 2d 713 (Mun. App. D.C. 1957), and *Rulstrand* v. *Kaman Aircraft Corp.*, D.D.C. Civil Action No. 259-58, in which *Mueller* was followed in cases similar to the instant case.

The opinion of the Court of Appeals in this case is no more in conflict with the *Florio* and *Westcott-Alexander* opinions than those cases are in conflict with each other. "As to questions controlled by state law . . . conflict among circuits is not of itself a reason for granting a writ of certiorari. The conflict may be merely corollary to a permissible difference of opinion in the state courts." *Ruhlin* v. *New York Life Ins. Co.*, 304 U.S. 202, 206 (1938).

In the third case, *Jaftex Corp.* v. *Randolph Mills, Inc.*, 282 F. 2d 508 (2d Cir. 1960), the court *held* that where a New York Corporation for more than six years took orders and processed them for a North Carolina corporation; received and acted upon, by investigation, response, and otherwise, all complaints, and provided the money at once for its principal by factorizing the contracts through its own subsidiary, the North Carolina corporation could be served in New York, especially since the claim against it arose out of these very activities conducted by the New York corporation. *Id.* at 511. The court stated in *dicta* that in diversity cases a federal rule is applicable to service of process, but the court *held* that the New Jersey corporation's contacts were such that it was subject to service regardless of which rule was applied. *Id.* at 510. Petitioners have cited no case in which a so-called federal rule, even if applicable under the local District of Columbia Code provision, would dictate proper service under the facts of the instant case, where respondent's contacts with the local life of the District of Columbia were minimal and where the cause of action arose out of facts having no particular relation to the District of Columbia.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be denied.

FRANK F. ROBERSON,
E. BARRETT PRETTYMAN, JR.,
DAVID N. WEBSTER
800 Colorado Building
Washington 5, D. C.

Attorneys for Respondent

HOGAN & HARTSON
800 Colorado Building
Washington, D. C.

ALASTAIR R. PATERSON,
85 Richmond Street, West
Toronto, Canada

Of Counsel